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No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1942

H. T. OVERSTREET, R. BRAZLE, AND L. L. GARVIN,
PETITIONERS

v.

NORTH SHORE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae*.

OPINIONS BELOW

The opinion of the district court (R. 8–10) is reported in 43 F. Supp. 445. The opinion of the circuit court of appeals (R. 11–13) is reported in 128 F. (2d) 430.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 28, 1941. A petition for rehearing was denied, without opinion, on June 30, 1942 (R. 13). A petition for a writ of certiorari, together with a motion for leave to proceed *in forma pauperis*, were filed on August 7, 1942, and were granted October 12, 1942 (R. 13). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether persons engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On September 26, 1941, petitioners and eleven other employees filed a complaint under Section 16 (b) of the Act against respondent and its subsidiary, Bay Shore Water & Light Company. The complaint alleged that petitioners were engaged in interstate commerce and were therefore

entitled to the benefits of the Act, but had not been paid the required minimum wages or overtime compensation (R. 1–8). Respondent's motion to dismiss as to all fourteen plaintiffs was granted by the district court (R. 8–10), with leave to the eleven plaintiffs alleged to be engaged in the maintenance of a telephone line operated by Bay Shore Water and Light Company to file an amended complaint. Since petitioners were not thus engaged, a motion to have the order of dismissal made final as to them was granted by the district court (R. 11).[1] The order dismissing the complaint was affirmed by the circuit court of appeals (R. 11–13).

The relevant facts alleged in the complaint, as amended (R. 1–8, 10), which must be taken as true for purposes of the motion to dismiss, may be summarized as follows:

Respondent owns and operates a toll road and a drawbridge which is a part of the road (R. 1–2). The toll road connects United States Highway No. 17, an arterial highway extending from Jacksonville, Florida, to New York City and points north, with Fort George Island, which lies off the northern coast of Florida. (R. 1–2.) The island is separated from the mainland by the Intercoastal Waterway, which extends from Miami to New York; the toll road crosses the Waterway at

[1] Of the original fourteen plaintiffs, only petitioners appealed to the circuit court of appeals, and respondent North Shore Corporation was the sole appellee.

Sisters Creek by means of respondent's drawbridge (R. 2).

The toll road, which is alleged to constitute "an integral part of the highway system of the United States," provides the only means of land communication between Fort George Island and the mainland and is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce (R. 2). Mail to and from other States as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road (R. 2–3).

Sisters Creek, a part of the Intercoastal Waterway, is a navigable stream used by freight-carrying vessels plying in interstate commerce between Florida and northern States as well as by pleasure craft moving to and from Florida (R. 2). "Many" vessels operating in such commerce pass through respondent's drawbridge daily (R. 4).[2]

[2] Sisters Creek is part of that section of the Intracoastal Waterway which extends south from Fernandina Harbor, Florida, to the St. Johns River, a distance of 25 miles. It is an important highway of commerce; in 1939 it carried 268,876 tons of freight and 15,900 passengers; in 1940 the amount of freight carried increased to 287,407 tons. Annual Report of the Chief of Engineers, U. S. Army, Part 2, *Commercial Statistics—Water-borne Commerce of the United States* (1941), p. 603. Three-fourths of the freight carried in 1940 (219,614 tons, or 76 percent) was "through traffic," i. e., shipments in interstate commerce. *Id.*, p. 604. Commercial vessels made more than 5,000 trips over this portion of the Waterway during 1940. *Id.*, p. 605.

Each of the petitioners was employed by respondent in connection with the operation of the toll road and the drawbridge. Overstreet was the operator of the drawbridge, raising the bridge to permit the passage of boats through Sisters Creek and lowering it for the resumption of traffic over the road (R. 4); Brazle was engaged in maintenance and repair work on the road and the bridge, his services being "necessary to the maintenance and use of the said toll road in interstate commerce" (R. 10); Garvin sold and collected toll tickets "from vehicles using said toll road in interstate commerce" and his duties "were necessary to the use and maintenance of the said road in interstate commerce" (*id.*). Petitioners received neither the minimum wages nor the overtime compensation prescribed by Sections 6 and 7 of the Act (R. 4–5, 6–8).

ARGUMENT

EMPLOYEES WHO MAINTAIN AND REPAIR THE TOLL ROAD, OR WHO MAINTAIN, REPAIR, OR OPERATE THE DRAWBRIDGE, OR SELL TICKETS AND COLLECT TOLLS FOR THE USE THEREOF ARE "ENGAGED IN COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE ACT

Upon the facts alleged in the complaint, petitioners are engaged either in the maintenance or operation of instrumentalities of interstate commerce, or they are engaged in both the maintenance and operation of such instrumentalities. The toll

road and the drawbridge are continuously used in the interstate movement of persons and goods;[3] operation of the drawbridge is, further, a function of interstate commerce since it also opens the path, when raised, for interstate commerce by water. Since plainly, neither the water-borne commerce on the Intercoastal Waterway nor the interstate transportation by automobile and truck along the toll road could proceed without the performance of petitioners' duties, there is little question that respondent's business is within the ambit of national authority under the commerce clause. *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, No. 59, this Term, decided November 9, 1942; *United States* v. *Wrightwood Dairy Company*, 315 U. S. 110; *United States* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.[4] And the regulation of the wages and working conditions of persons operating or maintaining these instrumentalities of interstate commerce is likewise clearly within the ambit of federal authority. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *United States* v. *Darby*, *supra*, p. 6; *Wil-*

[3] The intrastate movement of goods and persons over the toll road and bridge does not alter the character of these facilities as instrumentalities of interstate commerce, subject to national regulation as such. *Cf. Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 568–569.

[4] Indeed, the drawbridge (spanning as it does a navigable stream, which is a popular channel for interstate commerce)

son v. *New*, 243 U. S. 332; *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; *Second Employers' Liability Cases*, 223 U. S. 1; cf. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. Accordingly the States' power to tax the property of a corporation owning these instrumentalities (*e. g.*, *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Detroit Bridge Co.* v. *Tax Board*, 294 U. S. 83) does not imply any lack of authority in the Federal Government to regulate the activities here in question.

In fact, in the state tax cases "the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority." *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466. See also, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 46–48; *Minnesota* v. *Blasius*, 290 U. S. 1, 8; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311; *Stafford* v. *Wallace*, 258 U. S. 495,

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and its operation are peculiarly subjects for federal regulation. *Cf., e. g., Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421; *Bridge Co.* v. *United States*, 105 U. S. 470; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Kansas Southern Ry. Co.* v. *Kaw Valley District*, 233 U. S. 75; *Economy Light & Power Co.* v. *United States*, 256 U. S. 113; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177.

525–526; *Swift & Co.* v. *United States*, 196 U. S. 375, 400. While therefore those cases determine the circumstances under which the states may appropriately tax instrumentalities of interstate commerce (*Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165; *St. Louis & East St. L. Ry. Co.* v. *Hagerman*, 256 U. S. 314; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519; *Pittsburgh, etc., Ry.* v. *Board of Public Works of West Virginia*, 172 U. S. 32; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212) their conclusions as to the propriety of state taxation do not mark out the boundaries of federal power under the commerce clause.[5]

Nor do they cast any light on the meaning of congressional legislation in general or the Fair Labor Standards Act in particular. Determinations with respect to the propriety of state taxa-

[5] Compare, for instance, *Minnesota* v. *Blasius*, 290 U. S. 1 (cattle moving through stockyards on way to eastern markets, held subject to state property tax) with *Stafford* v. *Wallace*, 258 U. S. 495 (such cattle held subject to federal control under Packers and Stock Yards Act); *Bacon* v. *Illinois*, 227 U. S. 504 (grain temporarily in Illinois taxable by state) with *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (upholding federal regulation of trading in the same grain); *Townsend* v. *Yeomans*, 301 U. S. 441 (state regulation of tobacco warehousemen upheld) with *Mulford* v. *Smith*, 307 U. S. 38 (same warehousemen held subject to federal control).

See *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521, where Mr. Justice Frankfurter stated:

"* * * enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting

tion of instrumentalities of interstate commerce do not strip those instrumentalities of their characteristics as such. Compare *Pittsburgh, etc., Ry.* v. *Board of Public Works of West Virginia*, 172 U. S. 32, 43. And since those decisions did not seek to appraise or qualify the scope of national legislation in any way, or even to measure state power by implication from the language of federal statutes, they are of little assistance in ascertaining the coverage of a federal statute which embodies independent congressional policies and objectives. Thus, even if the state tax cases are relevant in determining whether respondent's business is in interstate commerce for some purposes, the coverage of this Act, addressed as it is to the activities of the employees (cf. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524–525; *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21, this Term, decided November 9, 1942), must be measured by different standards.[6]

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an unconstitutional burden on interstate commerce. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, with *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381."

For a fuller discussion of this question see the brief of the United States as *amicus curiae* in *Parker* v. *Brown*, No. 46, this Term, Point III.

[6] In that connection it should be noted that respondent's business is not less closely related to the "stream of commerce" than were, for example, the activities on the grain exchange in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, or the operations at the stockyards in *Stafford* v. *Wallace*, 258 U. S. 495; see *supra*, note 2.

More relevant data on the question whether petitioners are "engaged in commerce" within the Fair Labor Standards Act is furnished by the construction long given to comparable language of coverage in the Federal Employers Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65). Under the provisions of that Act, which like the Act here involved were aimed at the activities of employees and their relationship to interstate commerce (compare *First Employers' Liability Cases*, 207 U. S. 463, with *Second Employers' Liability Cases*, 223 U. S. 1, and cf. *Kirschbaum Co.* v. *Walling, supra; Warren-Bradshaw Drilling Co.* v. *Hall, supra*) it is now well established that petitioners' activities would constitute employment in interstate commerce. *Pederson* v. *Delaware, Lackawanna & Western Railroad*, 229 U. S. 146; *Kinzell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 250 U. S. 130, 133; *Southern Railway Co.* v. *Puckett*, 244 U. S. 571, 573; *Philadelphia, B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, 103–104. Compare *Southern Pacific Co.* v. *Industrial Accident Commission*, 251 U. S. 259; *New York Central Railroad Co.* v. *Porter*, 249 U. S. 168; *Philadelphia & Reading Railway Co.* v. *DiDonato*, 256 U. S. 327, 329–331; *Rader* v. *Baltimore & Ohio Railroad Co.*, 108 F. (2d) 980 (C. C. A. 7), certiorari denied, 309 U. S. 682. Cf. also *Louisville & Nashville Railroad Co.* v. *Parker*, 242 U. S. 13, 14–15. Of particular sig-

nificance for the present case is the decision in *Pederson* v. *Delaware, Lackawanna & Western Railroad Co., supra,* where, in holding that a person engaged in the work of maintaining tracks and bridges in proper condition during their use as instrumentalities of interstate commerce is employed in interstate commerce, Mr. Justice Van Devanter said:

> Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. * * * we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used *is so closely related to such commerce as to be in practice and in legal contemplation a part of it.* * * * [Italics supplied.] (p. 151.)

Neither the text nor the legislative history of the Fair Labor Standards Act affords any hint of Congressional intention to depart from these principles by contracting the phrase "in commerce" to include only employees who transport goods across state lines or otherwise participate directly in state-to-state movement.[1] Nor is there any evidence to indicate that Congress intended that employees who bear a "necessary" relation to production for commerce—a process once removed from actual commerce—would be covered by the Act while those who bear a considerably closer relation to the primary process of interstate commerce itself would not be covered. At the very least (particularly since "commerce" is a broader conception than "transportation," *cf. Chicago and North Western Railway Co.* v. *Bolle*, 284 U. S. 74) the coverage of the phrase "engaged in commerce" in the Fair Labor Standards Act would include activities which were sufficient to bring employees within the Federal Employers Liability Act. Certainly under the Act here involved, therefore, "work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such

[1] Indeed, the legislative history of the Act discloses that earlier constructions of that phrase by this Court were brought to the attention of Congress. See 83 Cong. Rec. 7434. Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), p. 43.

commerce" (*Kinzell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 250 U. S. 130, 133).

The conclusion that the clause "in commerce" as used in the Fair Labor Standards Act is not to be restricted in the manner indicated by the court below is confirmed by the decisions of this and other courts. In *Overnight Co.* v. *Missel*, 316 U. S. 572, a rate clerk employed by an interstate motor carrier was held to be engaged in commerce. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. The same result has been reached as to maintenance employees, watchmen, and office and clerical workers by the lower Federal and State courts. *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.); *Stoike* v. *First National Bank of the City of New York*, 5 Wage Hour Rept. 560 (N. Y. App. Div., 1942); *Atlantic Co.* v. *Walling*, 5 Wage Hour Rept. 916 (C. C. A. 5, 1942); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.); *Mortenson* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 (S. D. Iowa); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex., 1941); *Fleming* v. *Kull*, 4 Wage Hour Rept. 411 (E. D. Tex., 1941); *Spinner* v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144 (Ohio Ct. App., 1942); *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (M. D. Ala., 1941); *Walling* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320 (E. D. Ark., 1942). But *cf. Cochran* v. *Florida Natl. Bldg. Corp.*, 45 F. Supp. 830; *Johnson* v. *Dallas Downtown Development*

Co., 3 Wage Hour Rept. 984 (decided December 10, 1942, C. C. A. 5); *Tate* v. *Empire Bldg. Corp.*, 3 Wage Hour Rept. 475 (E. D. Tenn., 1942), pending on appeal in C. C. A. 6.

There is no occasion here to investigate the scope of the phrase "engaged in commerce" with respect to the activities of employees of persons whose business operations constitute part of the "stream of commerce." *Cf. Chicago Board of Trade* v. *Olsen, supra; Stafford* v. *Wallace, supra;* and compare brief for petitioner in *Walling* v. *Jacksonville Paper Company*, No. 336, this Term. The question presented by this case is considerably narrower. We submit that petitioners, in maintaining and operating the toll road and drawbridge which were in constant use in the interstate transportation of goods and persons are "engaged in commerce" within the meaning of that term in the Fair Labor Standards Act.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor,

PETER SEITZ,
Attorney,
Department of Labor.

DECEMBER 1942.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

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